APPENDIX B

SOUTHERN PACIFIC, TRANSPORTATION CO., Plaintiffs, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C-89-3603 DLJ
THE ATCHISON TOPEKA & SANTA FE RAILWAY CO., Plaintiff, v. STATE BOARD OF EQUALIZATION, et al., Defendants.	Nos. C-89-4030 DLJ C-95-3532 DLJ
	No. C-94-1199 DLJ
NAPA VALLEY WINE TRAIN, INC., and STOCKTON TERMINAL & EASTERN R.R. CO., Plaintiffs,	Master Consolidated No. C-81-4365 DLJ ORDER

v.)
)
STATE BOARD OF)
EQUALIZATION, et al.,)
)
Defendants.)

On July 18, 1997, the court heard argument on the following motions: (1) the State Board of Equalization's motion to dismiss; (2) Southern Pacific's motion for summary judgment; (3) Santa Fe's motion for summary judgment regarding its 1991 escape assessment (4) Santa Fe's motion for summary judgment regarding its 1993 NURPEFAR assessment; (5) the Wine Train plaintiffs' motion for summary judgment; (6) Southern Pacific's motion for leave to amend; and (7) Santa Fe's motion for leave to amend.

Paul J. Mooney appeared on behalf of Southern Pacific and Santa Fe; Terrence J. Benshoof appeared for the Wine Train plaintiffs; Marguerite C. Stricklin appeared for the State Board of Equalization; and Kevin L. Norris appeared on behalf of the County defendants.

Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby rules as follows:

I. BACKGROUND

These consolidated cases all arise out of complaints alleging that defendants State Board of Equalization ("the Board") and various California counties ("the Counties") violated § 306(1)(d) of the federal Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act") (codified in part at 49 U.S.C. U 11503).[1/] Plaintiffs are the following railroads: The Atchison, Topeka & Santa Fe Ry. Co. ("Santa Fe") (Case Nos. C-89-4030 DLJ and C-95-3532

1. In the latest recodification of the 4-R Act, effective January 1, 1996, 49 U.S.C. § 11503 was renumbered § 11501.

DLJ); Southern Pacific Transportation Co. ("Southern Pacific") (Case No. C-89-3603 DLJ); Napa Valley Wine Train, Inc., Stockton Terminal & Eastern R.R. Co., and Santa Maria Valley Railroad Co. (collectively "the Wine Train plaintiffs:) (Case No. C-94-1199 DLJ). In each case, plaintiffs challenge the Board's assessment of a tax on property classified by the Board as "non-unitary railroad property eligible for 4-R Act relief" ("NURPEFAR").[2/]

Section 306 of the 4-R Act prohibits states and their subdivisions from enacting certain taxation schemes that discriminate against railroads. See *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S.Ct. 843, 846 (1994). Specifically, § 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
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> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

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2. The two different categories of NURPEFAR at

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

4-R Act § 306(1).

A. The Santa Fe Cases

In 1993, the Court held a trial in Case No. C-89-4030 DLJ. Following the trial, the Court found that the board had engaged in discriminatory classification and taxation of Santa Fe's NURPEFAR in violation of § 306(1)(d). An Order to this effect was filed on June 7, 1994, followed by Findings of Fact and Conclusions of Law filed on September 7, 1994. On September 12, 1994, the Court entered the Partial Judgment submitted by Santa Fe, pursuant to which defendants were" permanently enjoined from collecting or seeking to collect any taxes on the Subject [NURPEFAR] Property as defined in the court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992." A Modified Partial Judgment was filed on April 24, 1995 in order to correct an incorrect amount set forth in the original judgment.

The Board filed a notice of appeal in this case on May 23, 1995. On June 29, 1995, the Board sent Santa Fe a notice of a non-unitary escape assessment for Santa Fe's commuter property for 1991, stating that the Counties would not attempt to collect any taxes based on this escape

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issue here have previously been labelled "restructuring plan property" and "commuter property.

assessment pending the outcome of the Board's appeal to the Ninth Circuit in Case No. C-894030 DLJ. Nonetheless, on October 4, 1995, Santa Fe filed a new case, C-95-3532 DLJ, alleging that the escape assessment for 1991 constituted a discriminatory tax in violation of § 306. At the time it filed the new case, Santa Fe also filed a motion for order directing the Board to show cause why it should not be held in contempt for issuing the escape assessment. In its motion, Santa Fe alleged that the 1991 escape assessment violated the injunction embodied in the Partial Judgment and Modified Partial Judgment in Case No. C-89-4030 DLJ. On February 26, 1996, the Court denied Santa Fe's contempt motion. Finally, on January 6, 1997, the Ninth Circuit dismissed the board's appeal in Case No. C-89-4030 DLJ as untimely.

B. The Southern Pacific Case

A trial was scheduled for December 1994 with respect to Southern Pacific's allegations that defendants violated § 306(d)(1) in assessing Southern Pacific's NURPEFAR. However, counsel for Southern Pacific, who is also counsel for Santa Fe, notified the Court on November 16, 1994 that a trial was not necessary, because the parties had come to an agreement. First, the parties agreed to enter a stipulated permanent injunction that would apply for the 1993 and 1994 tax years to the restructuring plan NURPEFAR. Second, they agreed to a stipulated preliminary injunction as to the "line sale" NURPEFAR which would also apply for the 1993 and 1994 tax years. Further preliminary injunctions were later entered with respect to Southern Pacific's NURPEFAR for the tax years 1995 and 1996. These stipulated injunctions effectively precluded any assessment for Southern Pacific's NURPEFAR pending the resolution on appeal of the related issues in the preceding Santa Fe case.

C. The Wine Train Case

In April 1994, the Napa Valley Wine Train, Inc. and the Stockton Terminal & Eastern Railroad Company filed an action, C-94-1199 DLJ, seeking relief for the 1993 tax year

and years thereafter. In 1995, the Court granted in part a motion to amend the complaint to add the Santa Maria Valley Railroad Company as a plaintiff, and Santa Barbara County as a defendant. However, because Santa Maria had already paid its 1993 taxes, it was granted leave only to seek relief for the 1994 tax year.

On June 20, 1995, following negotiations to which the Wine Train plaintiffs were not a party, the Court entered a Stipulated Order and Permanent injunction in Master Consolidated Case No. C-81-4365 DLJ, setting forth the formula for calculating the equalization ratio for each tax year beginning with 1994. The Board also used this formula to determine ratios for years prior to 1994. The plaintiffs in the Wine Train case were not among the designated parties to which the Stipulated Order and Permanent Injunction would apply. Nevertheless, the Wine Train plaintiffs now request that the Court enjoin the Counties from collecting taxes based on the 1990 through 1994 assessments of their property to the extent that those assessments are in excess of the stipulated ratios. Plaintiffs also seek a refund of previously overpaid taxes from the Counties.

D. The Present Motions

In 1996, the United States Supreme Court decided the case of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). The Court's opinion in that case severely limited Congress' ability to authorize suits against a state in federal court without the consent of the state. Based on this decision, the Board now moves, pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss all of the remaining cases in this consolidated action for lack of subject matter jurisdiction. Concurrently, plaintiffs Santa Fe and Southern Pacific move to amend their complaints to name the individual Board members as defendants and to state separate claims against the Counties. Finally, plaintiffs in all of the present cases move for summary judgment on the ground that this Court has already found the Board's NURPEFAR assessments to

be unlawful.

On July 18, 1997, the court held a hearing on all of the pending motions. On July 28, 1997, the Court requested supplemental briefing regarding certain issues that arose at the hearing. Having reviewed the supplemental briefs filed by the parties, the Court now rules as follows.

II. DISCUSSION

The Board argues that this case must be dismissed for lack of subject mater jurisdiction, as the Eleventh Amendment to the United States Constitution provides the Board, as an arm of the state, with immunity from suit in federal court. Plaintiffs respond that § 306 of the 4-R Act was a valid exercise of Congress' power to abrogate the state's Eleventh Amendment sovereign immunity with respect to challenges to discriminatory taxation of railroads.[3/] Alternatively, plaintiffs contend that if the Board is immune from suit, the individual Board members still may be sued under the doctrine of *Ex Parte Young*. Finally, plaintiffs argue that even if the Court dismisses the Board and its members from this suit, the suit may be maintained against the remaining County defendants.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the U.S. Constitution bars from the federal courts suits against a state by private citizens. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

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3. Plaintiff Napa Valley Wine Train also argues that the Board is not actually an arm of the state, and therefore is not entitled to sovereign immunity. This argument fails because the Ninth Circuit has explicitly recognized that the California State Board of Equalization is a state agency, entitled to Eleventh Amendment immunity. *See V. O. Motors* v. *State Board of Equalization*, 691 F.2d 871, 872-73 (9th Cir. 1982).

Unless a state has waived its Eleventh Amendment immunity or Congress has validly abrogated it, a state cannot be sued regardless of the relief sought. *See Atascadero*, 473 U.S. at 238; *see also Green v. Mansour*, 474 U.S. 64, 68 (1985).

The Board claims that it is entitled to Eleventh Amendment immunity in this case pursuant to the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Prior to *Seminole*, it was well settled that a federal district court had jurisdiction over state defendants alleged to have violated the 4-R Act by discriminatory taxation of railroads. However, *Seminole* reexamined Congress' authority to grant federal courts jurisdiction over nonconsenting state defendants. Specifically, in *Seminole* the Supreme Court held that the Indian Commerce Clause did not authorize congress to enact legislation granting federal courts jurisdiction over a nonconsenting State. *Seminole*, 116 S.Ct. at 1119. The Court held that Congress only has the power to abrogate states' Eleventh Amendment immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. Id. at 1125. In the case at hand, the Board argues that because the 4-R Act was not enacted pursuant to the Fourteenth Amendment, *Seminole* compels the conclusion that the Eleventh Amendment protects the Board from suit in federal court.

As a preliminary matter, plaintiffs argue that the issue of sovereign immunity must be raised as an affirmative defense. Because the Board has failed to do so, plaintiffs contend that the Board's present motion to dismiss for lack of subject matter jurisdiction is premature.

The exact nature of the Eleventh Amendment jurisdictional bar has never been precisely defined. *See Union Pacific R.R. Co. v. Burton,* 949 F.Supp. 1547, 1551 (D. Wyo. 1996) (citing Wright, Miller, and Cooper, Federal Practice and Procedure, § 3524 (2d ed. 1984)). While the Ninth Circuit has indicated that Eleventh Amendment

immunity should be treated as an affirmative defense which can be waived, *Itsi TV Productions* v. *Agricultural Associations*, 3 F.3d 1289, 1291-92 (9th Cir. 1993), the *Seminole* decision requires, where a state is entitled to Eleventh Amendment immunity, that the case be dismissed for lack of jurisdiction. *Seminole*, 116 S. Ct. at 1132 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Thus, the Court finds, in light of the *Seminole* decision, that the question of the Board's Eleventh Amendment immunity implicates jurisdictional concerns which are ripe for consideration at this stage.

Accordingly, the Court now turns to the question of whether Congress, by enacting the 4-R Act, has abrogated the Board's state sovereign immunity in the present case.

1. Abrogation for Eleventh Amendment Immunity

Congress may abrogate the states' Eleventh Amendment sovereign immunity if it has (1) unequivocally expressed its intent to abrogate the immunity and (2) acted pursuant to a valid exercise of power. *Seminole*, 116 S. Ct. at 1123; *see also Green*, 474 U.S. at 68. Here, there is no dispute that Congress, in drafting the 4-R Act, expressly intended to abrogate the states' sovereign immunity with respect to discriminatory tax rates and assessments applied to rail transportation property. *See* 49 U.S. § 11501(c); *see also ACF Industries, Inc.*, 114 S. Ct. at 850-51; *Trailer Train Co.* v. *State Board of Equalization*, 697 F. 2d 860, 865-66 (9th Cir. 1983). Thus, the issue left to be decided by this Court is whether Congress passed the 4-R Act pursuant to a valid exercise of power.

Whether a congressional exercise of power was valid turns upon whether the statute in question was passed pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole*, 116 S. Ct. at 1125. In *Seminole*, the court held that Congress only has the power to

abrogate states' Eleventh Amendment immunity pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment. Id. at 1125 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). In so ruling, the Court overturned *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which held that the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity. *Seminole*, 116 S. ct. at 1125, 1128. Consequently, in the present case, unless the Court finds that § 306 of the 4-R Act was passed pursuant to Congress' Fourteenth Amendment enforcement power, the court must hold that Congress' attempt to abrogate state sovereign immunity under the 4-R Act was invalid.

a. The 4-R Act was an Exercise of Congress' Commerce Power

As a starting point, it is undisputed that Congress was in fact acting pursuant to its power under the Commerce Clause in enacting the 4-R Act. The Supreme Court has recognized that the 4-R Act's purpose, as stated in the Congressional declaration of policy, is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). As just one of the means to achieve its goal of furthering railroad financial stability, Congress enacted § 306, prohibiting discriminatory State and local taxation of common and contract carrier transportation property." See *Trailer Train Co.*, 697 F.2d at 865 (quoting S. Rep. No. 630, 91st Cong., 1st Sess. (1969)).[4/]

4. Before passing § 306 as part of the comprehensive 4-R Act, Congress had given consideration to numerous bills containing language virtually identical to that of § 306. The Ninth Circuit has indicated that it is proper for courts to rely on the legislative history of these prior bills to assist in interpreting § 306. See *Trailer Train Co.*, 697

Despite the fact that the 4-R Act is obviously grounded in Congress' commerce power, plaintiffs urge the Court to find that the Act can also be viewed as a valid exercise of Congress' Fourteenth Amendment enforcement power. Plaintiffs are correct that the lack of an explicit reference by Congress to the Fourteenth Amendment in passing the statute is not dispositive. "The question of the constitutionality of action taken by taken by Congress does not depend upon recitals of the power which it undertakes to exercise." *See Woods* v. *Miller*, 333 U.S. 138, 144 (1948). There is in fact no requirement that congress recite the words "section 5" or "Fourteenth Amendment" or equal protection" in order to exercise its power under § 5 of the Fourteenth Amendment. *EEOC* v. *Wyoming*, 460 U.S. 226, 244 n. 18 (1983); *see also Fullilove* v. *Klutznick*, 448 U.S. 448, 476-78 (1980). Rather, it is the Court's task to decipher whether Congress has enacted legislation pursuant to § 5. *See Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698 (1st Cir. 1983).

In order to fmd that Congress acted pursuant to its Fourteenth Amendment enforcement power, the Court must be able to discern some "legislative purpose or factual predicate" that supports the exercise of that power. *Id.* (citing *EEOC* v. *Wyoming*, 103 S. Ct. at n. 18). The Court's inquiry must focus on whether or not the objectives of the legislation are within the scope of Congress' power under § 5. *Ramirez*, 715 F.2d at 698 (citations omitted); *see also Elrod*, 674 F.2d at 604, 608-09 (holding that courts must determine, by looking to the history and structure of the legislation, whether the purpose of the statute was within Congress' § 5 enforcement power); *see also Timmer* v. *Michigan Dept. Commerce*, 104 F.3d 833, 840 (6th Cir. 1997). *But see Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 15-16 (1981) (urging courts not to "quickly attribute" to Congress an unstated intent to act

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F.2d at 865 n. 6 (citation omitted).

pursuant to § 5).

b. Congress Did Not Enact the 4-R Act Pursuant to its Fourteenth Amendment Enforcement Power

The Court is aware of no post-*Seminole* Ninth Circuit decision to guide its inquiry into whether the 4-R Act is within Congress' Fourteenth Amendment enforcement power.[5/] Thus, the Court is left to look to the decisions of courts in other circuits regarding the validity of other statutes. For instance, in *Wison-Jones* v. *Caviness*, 99 F.3d 203, 210 (6th Cir. 1996), amended at 107 F.3d 358 (9th Cir. 1997), the Sixth Circuit was required to determine whether the Fair Labor Standards Act ("FLSA") could be regarded as an enactment to enforce the Fourteenth Amendment Equal Protection Clause.

In making its determination, the court looked to the factors set out in *Katzsenback* v. *Morgan*, 384 U.S. 641 (1966) (upholding the Voting Rights Act as appropriate to enforce the Fourteenth Amendment). Thus, the inquiry made by the Court was whether the statute

> (1) may be regarded as enactment to enforce the Equal Protection Clause, (2) whether it is 'plainly adapted to that end,' and (3) whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'

Wilson-Jones, 99 F.3d at 209 (citing *Katzenbach*, 384 U.S. at 651 (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819)).

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5. *Union Pacific R.R. Co.* v. *Burton*, 949 F.Supp. 1546 (D. Wyo. 1996) is the only published post-*Seminole* decision this Court finds that directly addresses whether the 4-R Act is within Congress' Fourteenth Amendment enforcement power. In *Union Pacific*, the court rejected the position that the 4-R Act could have been enacted to enforce the Fourteenth Amendment. *Union Pacific*, 949 F. Supp. at 1554.

Focusing on the first of the *Katzenbach* factors, the court concluded that the FLSA could not be regarded as serving a Fourteenth Amendment purpose simply because it was aimed at remedying wage "discrimination" between state and private-sector employees. *Wilson-Jones*, 99 F.3d at 210. Rather, the court held that, in the absence of explicit comment by Congress, it would regard as an enactment to enforce the Equal Protection Clause, "only efforts to remedy discrimination against a class of persons that the Fourteenth Amendment jurisprudence has already identified as deserving special protection. " *Id.*

Plaintiffs here read cases such as *Wilson-Jones* to require that this court inquire into whether Congress could have passed the 4-R Act pursuant to its Fourteenth Amendment enforcement power. This appears to the Court to be the method espoused by the Supreme Court, as well as other circuit courts. Nonetheless, this Court questions the wisdom of an analytical approach which requires the Court to determine what Congress could have done, as opposed to what it did in fact do, or what it would do given the opportunity to reenact the statute in light of the Supreme Court's holding in *Seminole*. In any event, in the present case, regardless of which analytical framework is employed, the Court easily finds, for the following reasons, that there is no way in which the 4-R Act can be viewed as a valid exercise of Congress' power to enforce the Fourteenth Amendment Equal Protection Clause.

First, it is clear that the purpose of the 4-R Act as a whole was to protect interstate commerce. Strong evidence of this goal is found in the statute's statement of policy, where only one of the fifteen stated policies is "to prohibit unlawful discrimination." *See* 49 U.S.C. § 10101(12). All of Congress' other stated objectives in regulating the railroad industry are either commercial in nature or based on public health and safety concerns. This policy statement, combined with the Supreme Court's interpretation of the 4-R Act as a

commerce-related statute, *see Burlington Northern*, 481 U.S. at 457, leads the Court to find that the 4-R Act is in no way grounded in equal protection concerns. *See Union Pacific*, 949 F.2d at 1554.

The Court also finds that even if it were to follow plaintiffs' suggestion and analyze § 306 independent from the rest of the 4-R Act, the same conclusion would be reached. *Cf. Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977) (holding that the Equal Pay Act is severable from the wage and overtime provisions of the FLSA for purposes of Fourteenth Amendment analysis); *Timmer*, 104 F.3d at 842 (same); *EEOC* v. *Elrod*, 674 F.2d 601, 610 (7th Cir. 1982) (holding that the ADEA was a valid enactment under the Fourteenth Amendment enforcement power even though it was part of the FLSA).

Plaintiff's argue that § 306 is "fundamentally an anti-discrimination statue" in that it requires states to tax railroads on an equal basis with other commercial property. In making this argument, plaintiffs rely heavily upon the legislative history of § 306, which repeatedly speaks of the problem of state tax discrimination against railroads. However, plaintiffs can point to only a single reference to the Equal Protection Clause in this extensive legislative history. This reference is found in a Senate Commerce Committee report which includes testimony regarding federal district courts voiding certain discriminatory taxes on railroads as violative of the Equal Protection Clause of the Fourteenth Amendment. *See* S. Rep. No. 630, 91st Cong. 1st Sess. at 7 (1969).

The Board does not dispute that § 306 was enacted in response to discriminatory state taxation of railroads. Rather, the Board questions the significance to be attached to the mere use of the word "discrimination" in the statute and in the legislative history. The Board argues, and the Court agrees, that the mere recitation of the words "unequal and discriminatory taxation," do not render the 4-R Act, or §

306 standing alone, an equal protection statute.[6] As discussed above, the statute's purpose is clearly to protect railroads in interstate commerce. *See Union Pacific*, 949 F. Supp. at 1553-54; *see also Burlington Northern*, 481 U.S. at 457. Thus, § 306 of the 4-R Act cannot be regarded as an effort to remedy discrimination against a class of persons traditionally given protection under Fourteenth Amendment jurisprudence. *Cf. Wilson-Jones*, 99 F.3d at 210. The Court is aware of no case which would even suggest extending the reach of this traditional protection to a group of taxpayers comprised of business entities running railroads. If the court were to find in this case that § 306 could be regarded as an enactment to enforce the Fourteenth Amendment simply because it contained a talismanic reference to "discrimination," then Congress § 5 enforcement powers would be limitless, thereby stripping the Supreme Court's *Seminole* decision of any real meaning.

In sum, the Court finds that the purpose of the legislation at issue in this case is to strengthen the railroads' position in interstate commerce, rather than to cure invidious discrimination against a discrete group which has

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6. The Court notes that other courts have found that there is nothing in the language or the legislative history of the 4-R Act to suggest that equal protection analysis is to be applied to claims under the statute. *See, e.g., ABF Freight System, Inc.* v. *Tax Div. of Arkansas*, 787 F.2d 292 (8th Cir. 1986) (citing *Atchison, Topeka, & Santa Fe Railway* v. *Lennen*, 732 F. 2d 1495 (10th Cir. 1994)); *Arkansas-Best Freight Systems, Inc.* v. *Lynch*, 723 F.2d 365 (4th Cir. 1983); *Clinchfield Railroad* v. *Lynch*, 700 F.2d 126 (4th Cir. 1983).

traditionally been protected by the Fourteenth Amendment. *Accord Union Pacific*, 949 F.Supp. at 1553-54. Thus, the Court finds that neither the 4-R Act as a whole, nor § 306 by itself, was validly enacted pursuant to Congress' Fourteen Amendment enforcement power. Therefore, under *Seminole*, Congress' use of the commerce clause in this case overstepped its authority in expressly authorizing 4-R suits against states in federal court. As a result, this Court lacks subject matter jurisdiction over the Board in this case. Consequently, the Board's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) must be granted unless it can be established that the Board waived its sovereign immunity.

2. Waiver of Sovereign Immunity

Plaintiffs argue that even if the Board was entitled to sovereign immunity at the outset of this case, it has since waived that immunity. "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero*, 473 U.S. at 241. A state's waiver of Eleventh Amendment immunity must generally be "unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (citation omitted). The Supreme Court has suggested, however, that Eleventh Amendment immunity may in some cases be forfeited by the state's failure to assert it. *See Blatchford* v. *Native Village of Noatak*, 111 S.Ct. 2578, 2584 n. 3 (1991) *see also Itsi*, 3 F.3d at 1291.

Plaintiffs contend that the Board has waived its immunity by litigating this case for sixteen years and stipulating to the various injunctions discussed above. However, as the Board points out, it was not actually entitled to sovereign immunity until last year, when the *Seminole* case was decided. In light of the fact that the Board had no challenge to this Court's jurisdiction until last year, the Court finds it difficult to see how the Board's appearance before this Court can be deemed a "voluntary" waiver of immunity.

In addition, in order for a state statute or constitutional provision to serve as a waiver of the state's Eleventh Amendment Immunity, it must specify the state's intention to subject itself to suit in federal court. *Atascadero*, 473 U.S. at 241-42 (emphasis added). Here, California Constit. Art. XIII, § 32 provides that only the state legislature may determine how and when the state may be sued with respect to collection of taxes. Statutes passed pursuant to this section provide that the sole remedy for challenging California taxes is a suit for refund. *See, e.g.*, Cal. Rev. & Tax. Code §§ 5140, et seq. Thus, California law provides no explicit waiver of sovereign immunity for suits challenging discriminatory taxes, such as the present case.

For the reasons stated above, the Court finds that the Board has not waived its sovereign immunity in this case, and must therefore be dismissed as a defendant. Having determined that the Board must be dismissed from the case, the Court must now decide whether the suit may proceed either against the individual Board members or against the County defendants alone.

B. *Ex Parte Young*

Plaintiffs, citing the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), contend that they can maintain their claims against the individual members of the Board. On this basis, plaintiffs Santa Fe and Southern Pacific have moved for leave to amend their present complaints.[7] The Wine Train plaintiffs do not similarly seek leave to proceed against the individual Board Members.

In *Ex Parte Young*, the Supreme Court held that the Eleventh Amendment does not bar a suit in federal court against a state official acting in violation of federal law. *Ex*

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7. Santa Fe has filed a motion for leave to amend only in Case No. C-89-4030 DLJ, and not in Case No. C-95-3532 DLJ regarding the 1991 escape assessment.

Parte Young, 209 U.S. at 159-60.[8] There are, however, limits on such suits. When a plaintiff brings a suit against a state official alleging a violation of federal law, a federal court may award prospective injunctive relief governing that official's future conduct, but may not award retroactive relief that requires the payment of funds from the state treasury. *See Edelman* v. *Jordan*, 415 U.S. 651, 667-69 (1974); *see also Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Natural Resources Defense Council* v. *California Department of Transportation*, 96 F.3d 420, 422 (9th Cir. 1996).

1. *Coeur d'Alene*

The Supreme Court recently reexamined the scope of the *Ex Parte Young* doctrine in *Idaho* v. *Coeur d 'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997). In that case, an Indian tribe and several of its members brought suit in federal court against the State of Idaho, state agencies, and state officials, alleging ownership of the banks and submerged lands of lake Coeur d'Alene. The Tribe sought a declaratory judgment, as well as an injunction prohibiting defendants from regulating the lands. The Ninth Circuit held that the State of Idaho and the state agencies were immune from suit; however, it found that the Tribe's claims could proceed against the state officials under the *Ex Parte Young* doctrine.

The Supreme Court reversed, holding the *Ex Parte Young* doctrine inapplicable. In reaching this decision, Justice Kennedy, joined by Chief Justice Rehnquist in the principal opinion, and joined in part by Justice O'Connor,

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8. In *Seminole*, the Court recognized the continuing viability of the *Ex Parte Young* doctrine. *See Seminole*, 116 S.Ct. at 1132-33. However, *Seminole* instructs courts to be wary of allowing a plaintiff to maintain a suit against a state official where "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 1132.

Justice Scalia and Justice Thomas, concurring, stated as follows:

> To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction . . . . Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Coeur d'Alene, 117 S.Ct. at 2034.

These same five Justices also joined in concluding as follows:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 2043.

In reaching this conclusion, Justice Kennedy, in parts of the principal opinion joined only by Chief Justice Rehnquist, endorsed a case-by-case balancing test for determining when the fiction of *Ex Parte Young* should apply. The factors to be considered under this balancing approach are as follows: (1) the availability of a state forum to hear the dispute; (2) the particular federal right at issue; and (3) the degree of

federal intrusion upon state sovereignty if the suit is allowed to proceed. *See Coeur d 'Alene*, 117 S.Ct. at 2035-38.

As stated above, Justice O'Connor, in a concurrence joined by Justice Scalia and Justice Thomas, agreed with the result reached in the principal opinion. However, the concurring Justices found that opinion to be "flawed in several respects. " *Coeur d 'Alene*, 117 S. Ct. at 2045 (O'Connor, J., Concurring). At its core, the concurring Justices' issue with the principal opinion is that it replaces a well-settled "straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" with a "vague balancing test." *Id.* at 2047. Thus, Justice O'Connor concludes as follows:

> While I do not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry for all cases in which a plaintiff invokes the *Young* doctrine, I nevertheless agree that the Court reaches the correct conclusion here. The *Young* doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands -- in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands - it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* doctrine, but I would not extend it to reach this case. *Id.* at 2047.

Finally, in dissent, Justice Souter, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, notes that Justice O'Connor "wisely rejects the lead opinion's call for federal jurisdiction contingent on case-by-case balancing." *Id.* at 2048 (Souter, J., dissenting).

Upon reading the *Coeur d 'Alene* decision, it is apparent that seven Justices explicitly reject the case-by-case balancing

approach espoused by Justice Kennedy in the principal opinion. Accordingly, plaintiffs argue that the principal opinion has no precedential value. The Supreme Court holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....'" *Marks* v. *United States*, 97 S.Ct. 990, 993 (1977) (citing *Gregg* v. *Georgia* 96 S.Ct. 2909, 2933 (1976)).

In *Coeur d'Alene*, five Justices found *Ex Parte Young* inapplicable under the particular circumstances of that case. Those same five Justices endorsed parts of the principal opinion in which Justice Kennedy pronounced that the applicability of the *Ex Parte Young* doctrine depends to some degree upon the extent of the federal intrusion on state sovereignty. Because a majority of the Supreme Court appears to endorse this view, this Court will now consider in the present case the extent to which state sovereignty would be threatened by allowing an *Ex Parte Young* to proceed under the 4-R Act.

In the case before this Court, the state obviously has a strong interest with respect to its power to tax property. Taxation has repeatedly been recognized as a central sovereign power of the state. *See, e.g.*, *Arkansas* v. *Farm Credit Services of Central Arkansas*, 117 S.Ct. 1776, 1780 (1997) ("The State's interest in the integrity of their own processes is of particular moment respecting questions of state taxation."); ACF Industries, 114 S.Ct. 843, 850-51 (1994) (recognizing state taxation authority as central to state sovereignty). The Board now argues that if plaintiffs were to be afforded an *Ex Parte Young* remedy in this case, the state's sovereign interest in the administration and adjudication of its tax laws would be seriously impacted. Plaintiffs respond that are not seeking to interfere with the state's power to tax; rather they characterize the remedy they

seek as merely an order that the state not be allowed to impose an illegal, discriminatory tax.

The Court finds that California's power to assess property taxes in the manner it deems appropriate would be impacted severely if the Court were to allow plaintiffs to proceed with this case under the fiction of *Ex Parte Young*. In addition, Court finds that the power to tax at issue here is every bit as central to state sovereignty as Idaho's interest in the submerged lands in question in *Coeur d' Alene*. Consequently, the Court finds that the nature of the present case is such that a federal court should not involve itself in a challenge to state administrative action. *Cf. Coeur d'Alene*, 117 S.Ct. at 2037-38. Accordingly, the Court holds that plaintiffs may not maintain the present suit against the individual members of the Board under *Ex Parte Young*.[9/]

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9. Although the other two factors in the principal opinion's balancing test have not been embraced by a majority of the Supreme Court, the Court will briefly address their application to the present case.

First, state courts are available in this case to vindicate the federal rights at issue, as the 4-R Act explicitly grants state courts concurrent jurisdiction over suits challenging discriminatory tax assessments on railroad property. See 49 U.S.C. § 11501(c).

Second, state courts are as capable as federal courts of interpreting and enforcing the particular federal right at issue here, the right to be free from discrimination in interstate commerce. *Cf. Couer d'Alene* at 2037 ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism"). Thus, the Court finds that applying the *Couer d'Alene* factors in the present case would result in a finding that the *Ex Parte Young* doctrine is inapplicable.

2. Finality of the Board's Assessments

An issue also arose at the July 18, 1997 hearing as to whether plaintiffs were even seeking prospective injunctive relief, which has always been a prerequisite to maintaining an *Ex Parte Young* suit. On the one hand, plaintiffs argue that the injunction they seek against the collection of future taxes should indeed be considered prospective injunctive relief. On the other hand, the Board argues that plaintiffs are actually seeking retroactive relief regarding assessments for past tax years. The Board further contends that because the assessments are already complete and have been certified to the counties, there is no continuing violation of federal law to enjoin under *Ex Parte Young*. *Cf. Union Pacific*, 949 F. Supp. at 1555.

In order to resolve this issue, the court requested, and thereafter received, supplemental briefing as to the status of the assessment still at issue. According to plaintiffs, the Board's assessments never became final because plaintiffs filed petitions for reassessment for each tax year at issue.[10/] The Board, however, refers the Court to the California Revenue and Taxation Code for the relevant procedures regarding petitions for reassessment. The Board also submits copies of its decisions on the petitions for reassessment at issue here. *See* Board's Request for Judicial Notice.

Under California law, where a petition for reassessment is filed, the assessment does not become final until the earlier of the Board's decision upon the petition or December 31st of the assessment year at issue. *See* Cal. Rev. & Tax. Code §§ 741-744. The evidence submitted by the Board

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10. In the Southern Pacific case, tax years 1993, 1994, 1995, and 1996 are at issue. In the Santa Fe case, only 1993 remains at issue, as permanent injunctions have been entered for all other tax years.

indicates that in each of the tax years at issue here, the Board acted upon plaintiffs' petitions for reassessment prior to December 31st of each of the relevant tax years. In addition, the evidence shows that in each instance the Board voted upon the assessments in question prior to or on the same day as the relevant injunctions were entered in the suits before this Court.

The assessments at issue became final under California law on the date on which action was taken by the Board. Thus, the Court finds that plaintiffs are in fact seeking retroactive, rather than prospective injunctive relief with respect to the Board, despite the fact that they are seeking to prospectively enjoin collection of taxes by the Counties. Because any violation of federal law by the Board is complete once the assessments have been finalized, the Court finds that no *Ex Parte Young* remedy is available to plaintiffs against the individual Board members.

C. The County Defendants

Finally, plaintiffs argue that even if this suit is dismissed against the Board and its members, plaintiffs should be permitted to proceed against the Counties, which serve as the tax collectors for the state. The Counties, however, contend that the entire case should be dismissed in the event that the Board is no longer a party because the Board, as the assessor of the taxes in question, is an indispensable party.

Federal Rule of Civil Procedure 19 governs the mandatory joinder of parties to an action. The Court must conduct a two-step analysis in determining whether additional parties must be joined in an action. First, under Rule 19(a), the Court must determine if joinder is feasible and the additional parties are necessary. Second, if the Court determines that the parties are necessary but that joinder is not feasible, it must determine under Rule 19(b) whether the action may continue without the absent parties. The Court does not reach the Rule 19(b) analysis unless it

has decided that the parties are necessary under Rule 19(a). *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1092 (9th Cir. 1985); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 (9th Cir. 1983).

1. The Board is a Necessary Party and Joinder is Not Feasible

Under the Rule 19(a) analysis, the Court first must determine whether joinder is feasible. Joinder is feasible if the party is subject to service of process and joinder will not deprive the Court of subject matter jurisdiction. Fed. R. Civ. P. 19(a); *Provident Tradesmen B. & T. Co. v. Patterson*, 88 S.Ct. 733, 737 (1968). As discussed above, the Court lacks subject matter jurisdiction over the Board, rendering joinder infeasible.

Next, the Court must determine whether the absent party is necessary. An absent party is necessary in two circumstances. First, if in the party's absence the Court is unable to accord complete relief to the parties present, the party is necessary. Fed. R. Civ. P. 19(a)(1). "Complete relief" in the context of Rule 19(a)(1) means that the existing parties can get meaningful recovery for their claims without multiple lawsuits on the same cause of action. *Northrop*, 705 F.2d at 1043. Second, an absent party is necessary if disposition of the case without that party would as a practical matter impair his ability to protect his interests, or would subject existing parties to multiple or inconsistent obligations. Fed. R. Civ. P. 19(a)(2); *see Aguilar*, 751 F.2d at 1089 (interpreting and applying Rule 19(a)(2)).

Plaintiffs' present suits challenge both their past tax assessments and the levying or collection on such assessments by the Counties as violations of § 306. It has been previously established in this case that the tax assessment/collection process works as follows. The Board is the entity which identifies, classifies, assesses, and values plaintiffs' property. The Board then informs the Counties of the assessed valuation for the subject property within their

boundaries, and informs the Counties of the value allocated to each tax rate area code appearing upon the roll of each county. The Counties, in turn, levy and collect property taxes for themselves and for each tax rate area code appearing on their rolls in accordance with the assessed values determined by the Board. *See* September 7, 1994 Order in Case No. C-89-4030 DLJ.

Given these circumstances, the Counties first argue that the Board is a necessary party to any § 306 suit because the Board must be available to defend the validity of its assessments. As explained above, in order to find a violation of § 306, the Court must necessarily find that the Board's valuations, upon which the Counties' levy and collection of taxes are based, were improper. Plaintiffs contend that this issue can be easily addressed if the Counties merely subpoena members of the non-party Board as witnesses in a suit challenging the assessments. However, the Court has serious problems with the idea of litigating the propriety of the state's tax assessments in a federal district court proceeding where the state is not even a party.

Moreover, the Court agrees with the Counties' argument that the Board is a necessary party because without the Board, the Counties are likely to be subjected to conflicting obligations. Under California law, the Counties are statutorily required to collect taxes in the amounts established by the Board. However, in the present suit, the Court has enjoined the Counties from collecting those taxes to the extent that they are discriminatory. Thus, if this suit is allowed to proceed without the Board as a party, the Counties will be forced to choose between not collecting the taxes in violation of state law, or collecting the taxes in violation of this Court's orders.

Thus, while plaintiffs argue that they are merely seeking an injunction against the collection of the invalid taxes by the Counties, for the reasons discussed above, the Court finds that the Counties' obligations are inextricably linked to

the assessments by the Board. Therefore, the Court finds that the Board is clearly a necessary party under Rule 19(a).

However, as stated above, the Court lacks subject matter jurisdiction over the Board. Consequently, the Court must now decide if the litigation can proceed in the Board's absence.

2. The Board is an Indispensable Party

Once the Court concludes under Rule 19(a) that an absent party is necessary and that joinder is not feasible, it must then determine whether the action can continue in the absence of the necessary party. Rule 19(b) delineates several factors to be considered and requires that the action be dismissed if it appears in "equity and good conscience" that the absent party is indispensable. Fed. R. Civ. P. 19(b); *see Provident Tradesmen*, 88 S.Ct. 733 (1968) (construing Rule 19(b)).

The Counties argue, based on the factors enumerated in Rule 19(b), that the Board is an indispensable party because (1) a judgment rendered in its absence should be prejudicial to the Board and to the Counties; (2) this prejudice cannot be lessened by the shaping of relief; (3) any judgment rendered in the Board's absence would be inadequate because it would not bind the Board; and (4) plaintiffs have an adequate alternative remedy of filing a 4-R Act suit in state court.

For the reasons discussed in the previous section, the Court agrees with the Counties that the Board is an indispensable party to the present suits. The Court sees no way to satisfactorily eradicate the prejudice to the Board which would invariably result if this litigation were to proceed without the Board as a party. Moreover, as stated above, the Counties would be placed in the untenable position of having to choose between violating either state law or federal law. Because the Court finds that there is no equitable manner in which to resolve these cases without the Board as a party, the Court must dismiss the entire case.

D. Plaintiffs' Motions for Summary Judgment

While all of the remaining plaintiffs have moved for summary judgment, certain of these motions are moot as a result of the Court's finding that the case must be dismissed. Because no final judgments have been issued in either the Southern Pacific case or the Wine Train case, both of those cases will be dismissed for the reasons stated above.[11/]

However, because a final order and a judgment has already been entered by the Court with respect to all of the Santa Fe assessments for tax years 1989 through 1992, the Court shall grant summary judgment for Santa Fe in case No. C-95-3532 DLJ regarding the 1991 Escape Assessment.[12/] In addition, because the stipulated injunction with respect to tax year 1993 became permanent when the Ninth Circuit dismissed the Board's appeal, the Court grants summary judgment for Santa Fe with respect to the 1993 NURPEFAR assessment as well.

III. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS as follows:

(1) Southern Pacific Case No. C-89-3603 DLJ is

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11. The Court notes that were it to rule on the Wine Train plaintiffs' summary judgment motion, that motion would be denied on the grounds that the Wine Train plaintiffs are not entitled to relief for tax years not included in their complaint, nor are they entitled to retroactive relief in the form a refund of taxes which have already been paid.

12. At the hearing, the Board raised a question as to whether the permanent injunction and judgment in Case No. C-894030 DLJ applies to NURPEFAR commuter property for years other than 1992. The Court now clarifies that the injunction and judgment apply to all Santa Fe NURPEFAR property for all tax years between 1989 and 1992.

hereby DISMISSED for lack of jurisdiction;

(2) Wine Train Case No. C-94-1199 DLJ is hereby DISMISSED for lack of jurisdiction;

(3) Summary judgment is hereby GRANTED for Santa Fe in Case No. C-894030 DLJ and Case No. C-95-3532 DLJ.

(4) The prevailing parties in each of these actions shall file proposed judgments consistent with this order within thirty days of the date of this order. Any party may file comments regarding these proposed judgment within two weeks of the filing of the proposed judgments.

IT IS SO ORDERED.
Dated: October 28, 1997.

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D. Lowell Jensen
United States District Judge

APPENDIX B

THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.,	)	No. C-89-4030 DLJ
	)	Master Consolidated
	)	No. C-81-4365 DLJ
Plaintiff	)	
	)	JUDGMENT
STATE BOARD OF EQUALIZATION, et al.,	)	
	)	
Defendants.	)	
	)	

Pursuant to the Court's Order issued on October 28, 1997, the Court hereby enters judgment in favor of plaintiff Atchison Topeka & Santa Fe Railway Co. and against all defendants. It is further adjudged that the preliminary injunction previously entered with respect to the 1993 tax year is now permanent.

IT IS SO ADJUDGED.

Date: February 2, 1998

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D. Lowell Jensen
United States District Judge

THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.,	)	No. C-95-3532 DLJ
	)	Master Consolidated No. C-81-4365 DLJ
Plaintiff	)	
	)	JUDGMENT
5.	)	
STATE BOARD OF EQUALIZATION, et al.,	)	
Defendants.	)	

Pursuant to the Court's Order issued on October 28, 1997, the Court hereby enters judgment in favor of plaintiff Atchison Topeka & Santa Fe Railway Co. and against all defendants. It is further adjudged that the preliminary injunction previously entered with respect to the Notice of Escape Assessment for tax year 1991 is now permanent.

IT IS SO ADJUDGED.

Date: February 2, 1998

D. Lowell Jensen
United States District Judge

THE ATCHISON TOPEKA & SANTA FE RAILWAY CO.,	)	No. C-89-4030 DLJ C-95-3532 DLJ
Plaintiff	)	ORDER
5.	)	
STATE BOARD OF EQUALIZATION, et al.,	)	
Defendants.	)	

On May 13, 1998, the Court heard argument on defendant State Board of Equalization's motion to alter or set aside the judgments entered on February 3, 1998. Paul J. Mooney appeared for plaintiff; Marguerite C. Stricklin appeared on behalf of defendant. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES defendant's motion.

IT IS SO ADJUDGED.

Date: May 14, 1998.

D. Lowell Jensen
United States District Judge